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Supreme Court, U.S.
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No. 00-628

In the Supreme Court of the United States

CYNTHIA TAYLOR,

Petitioner,

v.

HAMILTON CARMOUCHE, MARGARET FELTON, and CITY OF GARY, INDIANA

Respondents.

On Petition for Writ if Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Seventh Circuit's misapplication of the standards set in *Connick v. Myers* derogates the holding of the Supreme Court that, the "right" of a municipal employee to protest racial discrimination is a matter inherently of public concern and is in conflict with other decisions of the Supreme Court and Circuit Courts.

II. Whether the Seventh Circuit invaded the province of the jury when it failed to comply with the standard of review regarding granting a judgment n.o.v. by making many factual and credibility determinations in favor of the movant.

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DISPUTED FACTS

The Respondents have presented facts to this Court that Petitioner believes are misstated, misleading and at times untrue. The Petitioner responds as follows:

Respondents state on page 1 of their brief that there was a revolt by the staff against Felton, the only white person in the office, because she wanted to implement stricter office procedures. Respondents ignore the evidence that the staff perceived Felton's behavior as racist which petitioner contends is the reason the staff had difficulty with her. (R. 76, pp. 19-20; R. 73, pp. 155-59, R. 75, pp.104-05; R. 74, p. 232). This perception by the staff and the many attempts to address it preceded most if not the entire behavior Respondents refer to as a revolt. Also, the Respondents are incorrect in stating Felton was the only white person in the office. There was another white female assistant city attorney working in the office.

Respondents' Brief, page 2, states that Taylor assumed the role of spokesperson for the secretaries. Respondents fail to mention that Taylor was the only African-American person working in the office full-time with a position higher than non-attorney staff. Taylor also held the same position as Felton when the staff initially began addressing their concerns about Felton. Therefore, Taylor was the only African-American attorney in the office, full-time, who witnessed Felton's behavior on a regular basis. It stands to reason that the staff would look to Taylor to assist them in dealing with the perceived racism by Felton. Respondents also fail to mention that subsequent to Taylor, a white male attorney

complained about the treatment of the secretaries in the law department. (R. 74, pp. 62-64; R. 77, pp. 79-81).

Respondents' Brief, page 2, suggests that because Taylor didn't hear Felton make a racial slur and that she did nice things occasionally for a needy black person that that is somehow evidence that she was not racist or did not behave in a racist manner. If the standard for determining if someone is racist is a white persons perception of what racist behavior is or, if African-Americans have to educate the courts about the various forms of racism, then African-Americans will be faced with an almost insurmountable burden and will rarely if ever have the ability to prevail in this judicial system.

In their attempt to prove Felton is not racist, Respondents ignore that many shared this perception of Felton's behavior as racist. (R. 74, p.232; R. 76, pp 19-20; R. 73, pp. 155-59; R. 75, pp. 104-05). They also neglect to mention that Felton and Carmouche were ultimately fired by the mayor who stated he was aware of the complaints of racism against them, had discussions about the complaints and that his decision to fire them included their inability to keep African-American attorneys. (R. 74,190; 192-93; 200-02). Respondents also fail to mention that there was substantial testimony that Carmouche behaved in a racist and sexist manner on a regular basis. (R. 76, pp. 22-23; R. 75, pp. 110-12; R. 76, pp. 68-70; R. 75. pp. 100, 111-13, 115; R. 75, p.5; R. 74, pp. 225-227; R. 74, pp. 75-76; R. 74, p. 257; R. 75, pp. 94-96; R. 74, pp. 64-65; R. 75, pp. 96-99, 102, 131; R. 76, p.69; R. 74, pp. 211-212, 215-16; R. 74,pp. 162, 170. The connection between the staffs' perception of Felton as racist and the fact that Felton

prospered in this racist environment surely cannot escape the observation of the Court.

Respondents' Brief, page 3, states that Taylor was going to raise racism at Smith's grievance hearing, but Carmouche objected. The more accurate statement would be that while trying to testify, Carmouche objected and Taylor was prevented from testifying further. (R. 76, p. 175).

Also on page 3, Respondents state that Felton was opposed to Taylor's medical/maternity leave because she though it was excessive. Respondents fail to mention that Felton sent interrogatories to Taylor's doctor. The doctor's answers to the interrogatories detailed Taylor's condition, the reason she needed a leave and the potential for further injury if she did not receive it. (R. 73, pp. 116-121; R. 76, p. 157, ex. 36).

On page 4, Respondents' state that Taylor worked without incident after giving notice that her maternity leave would begin October 31. Respondents neglect to mention that on October 3, 1994, Taylor had a grievance hearing that was interrupted by the intervention of the deputy mayor and the next morning Carmouche and Felton approached Taylor with an agreement to resolve the grievance. (R. 74, p. 126; R. 76, p. 52-53). This is why Taylor worked without incident until her maternity leave.

Also on page 4, Respondents state Taylor requested therapy for an injury she received a year before and the City's personnel policy made it mandatory that she receive an evaluation. Respondents neglect to mention that they were fully

aware of the continuing problems Taylor had with the injury as evidenced by her therapy in July 1994 and the interrogatories they requested in September 1994. (R. 73, pp. 116-121; R. 76, p. 157, ex. 36). They also fail to mention that they never advised Taylor of the need for an evaluation prior to the day she returned from maternity leave (R. 76, p. 185); that, Taylor contacted Felton on December 16, 1994 and advised her of the therapy but was not advised of the need for an evaluation (R. 76, p. 157-58); that, Taylor was never required to secure a medical evaluation when she initially returned to work after the injury nor was she required to secure one for her maternity; that, Carmouche stated that he made the policy in the law department; and the personnel policy was typically not followed in the law department. (R. 73, pp. 100, 127, 129; R. 76, pp. 157-58; R. 77, pp. 67-68; R. 77, pp. 101-113).

The Respondents further state, on page 4, that the City did not receive a response as to Taylor's fitness for duty for "several weeks". Respondents neglect to mention that Taylor testified that she contacted the City's doctor immediately to set an appointment. (R. 76, p. 159). Respondents also neglect to mention that the request for the evaluation was made on December 19, 1994 and that between that time and the time the City's doctor sent his documentation on January 18, 1995, the Christmas and New Year holidays occurred; that the City has documentation that Taylor was seen by the City's doctor on January 6 and 11,1995 (ex.); and, that the City's doctor requested and received a medical report from Taylor's doctor on January 16, 1995 (ex.).

The statements in Respondents' Brief, pages 5

and 19, deceptively attempt to present to this Court that Taylor's work restrictions that were imposed by the City's doctor had nothing to do with the requirement that she work on the fourth floor. The fourth floor office required Taylor to walk up two and a half flights of stairs. The law department is not handicap accessible. The record clearly demonstrates Respondents insistence that Taylor work on the fourth floor. (R. 73, p. 134; R. 76, pp 162-64, 166; R.74, p. 25). Respondents attempted to force this requirement in August 1994 and made it a condition of Taylor's return to work after her maternity leave. (R. 73, p. 134; R. 76, pp. 52-54, ex. 36). Respondents make reference to a letter welcoming Taylor back to work but fail to mention the two letters in response where Taylor again addresses the issue of her inability to climb stairs and that being the reason for her work restrictions. (ex.) Additionally, Respondents attempt to make Taylor responsible for the actions of the City's doctor. Taylor had no control over what their doctor recommended or what he included in any report he submitted.

Respondents also state, on page 5, that Taylor was never told she was fired and took another job. They fail to state that Respondents refused to pay her and blocked her from receiving workman's compensation thus she had no income and a new baby since December 1994. (R. 73, p. 133; R. 77, p. 65). They also fail to state that Taylor in fact continued to work with restriction, received therapy and endured two surgeries while employed at her new job. (R. 76, p. 15).

On page 21, Respondents argue that Taylor did not refute that the City's Personnel Manual made medical certification mandatory or that the rule was

applied differently. On the contrary, Taylor argued that the rule was applied selectively. Taylor testified that the rule was never applied to her prior to her return from maternity leave and that the personnel manual was only selectively used in the law department. (R. 73, pp. 100, 127, 129, 141; R. 76, pp. 157-58; R. 77, pp. 67-68; R. 77, pp. 101-113). Additionally, Taylor presented evidence that she was treated differently, for example, Felton while holding the same position as Taylor, assistant city attorney, was allowed several weeks off with pay to care for her child who had chicken pox yet, Taylor was not allowed to attend therapy for two hours three times a week. (R. 77, pp. 89-90). Additionally, prior to Taylor's maternity leave she was forced to return to work over her doctor's objection, but after her return she was not allowed to return to work even though she had approval by her doctor. (R. 77, p. 101). Respondents also fail to mention that Felton made plans to give Taylor's position to another person prior to Taylor's return from her leave. (R. 77, p. 72).

Throughout the remainder of Respondents' Brief they attempt to use these misstated facts to support their argument. They also mischaracterize Taylor's role as it related to her involvement with the secretaries as that of leading a battle for the secretaries and actively interfering with the disciplinary decisions regarding the secretaries. They fail to mention that prior to Felton's promotion to City Attorney, there was an open door policy with Carmouche to come in and discuss anything with him and that many times Carmouche called Taylor and Smith into his office to discuss office matters. (R. 73, pp. 155-59, R. 75, 104-05). They also fail to mention that Carmouche transferred Smith, the most

vocal secretary regarding Felton's perceived racist behavior, to be Felton's secretary in July 1994. (R. 73, p. 102). He did this knowing full well there were problems between the two. They further fail to mention that Carmouche told Felton that Smith said she was racist. (R. 75, p. 107). The alleged battles in the office, if any, were fueled by Carmouche.

The Respondents classify Taylor's role as being involved in a battle but, there is no evidence that Taylor did anything more than have private discussions with Carmouche and his superiors. Additionally, the only disciplinary decision regarding a secretary Taylor had any involvement with was her testimony at Smith's grievance hearing.

REASON FOR GRANTING THE WRIT

This Petition Should Be Granted Because The Seventh Circuit Has Derogated the Holding of the United States Supreme Court in *Connick v. Myers* That the "Right" of a Municipal Employee to Protest Racial Discrimination Is a Matter Inherently of Public Concern. The Seventh Circuit's Ruling That an Employee's Complaints That a Supervisor Acted in a Racist Manner Is Not Protected Speech Because it Is Not a Political View about What Legal Policies the Employer Should Adopt; And, That an Employee's Subpoenaed Testimony on Behalf of a Co-worker Is Not Protected Because it Occurred in the Context of an Internal Grievance Hearing Is in Conflict with Decisions of the United States Supreme Court and the Circuit Courts. Additionally, Although Federal Rule of Civil Procedure 50 Requires That All Evidence and Inferences Must Be Taken in the Light

Most Favorable to the Non-Moving Party, the Seventh Circuit Invaded the Province of the Jury When it Made Numerous Factual and Credibility Determinations After the Jury's Verdict While Drawing Inferences in Favor of the Moving Party.

CONCLUSION

Respondents' statement of the case is deceptive. Petitioner could continue to address each fact provided by Respondents and present evidence showing it was either misstated, mischaracterized or that relevant facts were omitted.

Petitioner was placed in the arduous position of either speaking out against racism in the City of Gary Law Department or being a quiet participant by saying nothing. Taylor spoke out on behalf of the staff, other African-American attorneys and the citizens as a whole. Taylor attempted to address these concerns with Carmouche and his superiors and was retaliated against as a result. Taylor's only recourse was to utilize the judicial system and exercise her right to a jury trial. In spite of the trial judge dismissing the majority of her case and not having a jury of her peers, Taylor still prevailed.

The facts in this case are clearly in dispute and the Respondents lacked any credibility at trial. In ruling in this case, the lower courts were required to look at the facts in the light most favorable to the Petitioner, the non-moving party, and they did not. Instead, they viewed the facts in the light most favorable to the Respondents who consistently misrepresented the facts. To allow the lower courts to

ignore the standard of review or deem this case a misapplication of the facts amounts to denying petitioner and all similarly situated victims of discrimination access to a jury and thus to justice. This case belongs before a jury, the trier of facts.

For these and all the reasons presented in Petitioner's Writ of Certiorari, Petitioner urges this Court to reverse the decisions of the courts below and reinstate the jury verdict and/or remand this case for trial.

Respectfully Submitted,

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